No. 15670

United States Court of Appeals

For the Ninth Circuit

NORTHWEST AIRLINES, INC., *Appellant,*

vs.

GERALDINE B. GORTER, as Administratrix of the Estate of John M. Waldrep, Deceased, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

KARR, TUTTLE & CAMPBELL,
CARL G. KOCH,
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APPELLANT'S REPLY BRIEF

I. The Accident Happened in British Columbia

As one of the issues in this appeal, appellant, in its opening brief, asserted that the district court's finding that the accident happened seaward of low water mark was totally unsupported by and contrary to the evidence. The question of where the accident happened is the very heart of this appeal. Yet, appellee has been unable to point to a single scrap of evidence in support of the finding, even though she makes extended reference to testimony of Dudley Cox, Paul Sanders, Hufford Maynard, Donald Baker, and Richard Fields. Let us now examine this testimony. Mr. Cox stated that on one occasion he observed that the wreckage was covered by water; that on another he was unable to walk out to the wreckage; and that three or four days after the accident parts of the wreckage began to break off due to weather and tides. Mr. Sanders stated that the airplane was further damaged after the accident by the changing of the tides; that salvage attempts were made; and that divers inspected the wreckage. Messrs. Maynard and Baker stated that a small outboard boat towed the five survivors through the water to safety and that rescue

operations took about fifteen minutes. Mr. Fields stated that at the time he left the airplane, the water was over his head.

The foregoing is the only evidence that appellee has cited to support the finding that the accident happened seaward of low water mark. It is difficult to see how this testimony can in any way support such a finding; it goes no farther than to establish that the airplane crashed in the water, a fact which has never been questioned. In fact, Joseph Kildahl, the maritime navigation expert, testified that at the time of the accident the height of the tide was 10 feet and rising at the rate of 2 feet per hour (R. 1049). Conspicuously absent from the testimony relied on by appellee is any reference to low water mark. The question of where the airplane crashed with respect to low water mark is entirely unanswered. Appellee cannot answer the question because nowhere in the record is the testimony she relies on related in any way to low water mark. On the other hand, such testimony does establish that the airplane was in the tidal waters surrounding Sandspit. Necessarily then the airplane would be out of water at times and in water at other times, depending on the stage of the tide.

Being unable to find any evidence in the record to support the district court's finding, appellee desperately flails away at the evidence which would amply support a contrary finding, to-wit: that the accident happened *landward* of low water mark. This, of course, can in no way justify the unsupported finding that the accident happened seaward of low water mark. Brief reference shall be made to appellee's attempt to avoid the effect of the testimony of Donald Leonard, which, together with the testimony of Joseph Kildahl, conclusively shows that the accident happened landward, not seaward, of low water mark. Mr. Leonard visited the scene the day after the accident in January, 1952, and again the following June. Mr.

Leonard stated that in June the airplane was completely out of the water at low tide. Mr. Kildahl established that the low tide on that occasion did not extend out to low water mark but was landward of it. This established that the airplane crashed *landward* of low water mark and in British Columbia. Appellee seeks to undermine Mr. Leonard's testimony by suggesting, without any support from the record, that during the period between Mr. Leonard's visits, the airplane was carried hither and yon by the tides. While it is true that parts of the airplane gradually became detached and were floated away by the tides, the main, central portion of the airplane, the wing, engines, nacelles, and main landing gear, remained intact (R. 996). Far from being carried about, the airplane was being gradually buried in the sand (R. 996). Appellee also ignores Mr. Leonard's testimony that the wreckage of the airplane lay in exactly the same location in June as in January after the accident (R. 995). Mr. Leonard further stated that during the salvage operations in January, the airplane was moved but slightly, and when abandoned the airplane was no closer to shore than before (R. 995). Appellee pointed to no evidence, nor is there any, contradicting the testimony of Mr. Leonard. The finding that the accident happened seaward of low water mark is unsupported by and contrary to the evidence.

II. Prior Adjudication

Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, is a leading case repeatedly cited in Washington for the proposition that a decision of that court is the law of the case in another action between the same parties and upon the same subject matter. It further holds that where the state of the pleadings is such that the plea of *res judicata* cannot be interposed and there is no opportunity to raise the point on the introduction of

evidence, the court will take judicial notice of the prior case. Accord: *Reagh v. Hamilton*, 194 Wash. 449, 78 P.2d 555.

The rule of pleading and proof is also relaxed where the former adjudication is not relied upon as an estoppel or in bar. When relied upon merely to establish some fact or issue necessary to a party's case, it need not be pleaded although it is conclusive evidence of such fact or issue. *S.P.R.R. v. U.S.*, 168 U.S. 1, 42 L.Ed. 355; Anno. 120 A.L.R. 8, 67,68.

To set the record straight, appellant's answer was filed December 30, 1955. *Northwest Airlines v. Gorter,* 49 Wn.2d 711, 306 P.2d 213, was decided January 18, 1957. The instant case, originally set for trial October 11, 1956, was continued on motion of appellee until March 12, 1957 (R. 41-42), because the state court decision had not yet been handed down. In the state court case it was found and held in plain and unambiguous terms that the accident and death occurred in British Columbia, Canada. Appellee so alleged in her complaint and she maintained this position throughout the trial. Appellant admitted this fact in its answer, and it was its consistent position at all times. The pre-trial order (R. 51), recited that the accident happened in British Columbia, and that order became the final pleading in the case by order of the trial judge. It was an agreed fact at all times during the pendency of the litigation and throughout the trial. A primary purpose of pleadings in the federal court is to give notice of the pleader's position. If appellee's position was that the accident did not happen in British Columbia, it was a closely guarded secret from beginning to end. She can point to absolutely nothing that so much as hints that the accident happened elsewhere. With this state of the pleadings it is obvious that the appellant had neither the opportunity nor the occasion to introduce evidence of the prior adjudication

to establish where the action happened. If the district court, even though the issue was not in dispute, took upon itself to make an independent determination of where the accident happened, it should have taken judicial notice of the state court decision in accordance with *Wilkes v. Davies, supra.*

As to the scope of the *res judicata* doctrine, a judgment affirming the existence of any fact is conclusive upon the parties whenever the existence of that fact is again an issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court. This is the general rule, adopted in Washington. *In re Clifford,* 37 Wash. 460, 79 Pac. 1001, quoting Black, *Judgments,* 2nd Ed., Sec. 609; Freeman, *Judgments,* 4th Ed., Sec. 249, 253.

III. Rejection of Proof of Foreign Law

Appellant is very much incensed and believes that it is time to forcefully direct the court's attention to appellee's continued misrepresentation and distortion of the content of its twelfth affirmative defense. This defense was added to its answer "so that the proper wrongful death statute applicable to the facts of this case may be pleaded," (Motion to Amend, R. 42) and reads in part:

> "Defendant . . . alleges that *the* applicable statute on which plaintiff's claim could have been based is Chapter 116, British Columbia Revised Statutes, 1948 . . ."

Appellee repeatedly distorts the pleading by asserting: Page 5—"Appellant merely pleaded that the act 'could' apply." Page 35—"Appellant amended its answer denying the applicability of the Washington Wrongful Death Act, alleging that appellee 'could' have brought its action under . . . the Families' Compensation Act." Page 40—"[Appellant asserted] that a foreign statute 'could' be applicable . . ."

Page 41—"Appellant asserted by its own allegation '*could* have been based,' that other laws might govern appellee's right of action;" Page 43—"Appellant's only allegation . . . was that the act . . . 'could' have been applied . . ." Appellee resorted to this same deception in the heat of the trial in objecting to the introduction of evidence relating to the foreign law. The continued twisting and distorting in appellee's brief can no longer be ignored; it is obvious and deliberate. Appellant submits that considerations of professional integrity, honesty and candor should outweigh the immediate objectives of appellee's counsel in this litigation.

Appellant proved the pertinent sections of the Families' Compensation Act, including the one-year statute of limitation, and the district court so acknowledged (R. 1039). The court excluded evidence offered to prove that the act was the only wrongful death act in British Columbia and in Canada seaward of British Columbia. The court erred in rejecting this evidence because appellant's affirmative defense stated that said Act was "*the* applicable statute on which plaintiff's claim could have been based." (Emphasis added) In other words, no other law afforded appellee a remedy.

Apart from appellant's twelfth affirmative defense, this evidence was admissible under appellant's general denial (R. 29) of the asserted cause of action under the Washington death statute. Appellant has never contended that if the action arose in Canada outside of British Columbia that a statute of limitation applicable there was a defense to this action. On the contrary, appellant strenuously urged, offered proof, and even moved to reopen the case to show that no law recognized a cause of action for wrongful death at that place.

Appellee at all times proceeded in reliance upon Washington law (R. 44), even though she now concedes that the Washington wrongful death act does not have extraterritorial force and that she does not have a cause of action under it, as such (Br. 24-25). Appellant in its answer denied that the Washington act was applicable under the facts stated in the complaint. Under such denial appellant was entitled to introduce evidence to prove that appellee had not established a claim under which relief could be granted under Washington law, either directly or aided by a presumption. It was proper by way of general defense to prove the inapplicability of the Washington wrongful death act in the case at bar by showing the non-existence of a cause of action or remedy of this sort under the law of the place where the court found the accident and death occurred. Federal Rules of Civil Procedure, Rule 8(c), 28 USCA 253 does not classify or define a defense of this nature as one which must be affirmatively pleaded.

To this end, appellant attempted to prove, through Mr. John I. Bird, the Canadian law expert, that there was no wrongful death statute at such place. Had this proof been admitted there would have been no basis for presuming that a Canadian statute existed and was identical to the Washington statute, and the latter could not have been applied. The exclusion of such testimony on the ground that no foreign law, except the Families' Compensation Act, had been pleaded was reversible error.

IV. Foreign Statute of Limitations, How Applied

Because appellant is a non-resident of Washington, and any cause of action which arose was in favor of deceased's wife and child, non-residents, not Geraldine Gorter, the nominal plaintiff, R.C.W. 4.16.290 is very much applicable.

V. Presumption as to Foreign Law

Appellee, realizing that federal courts cannot take judicial notice of the laws of a foreign country, recognizes that the only possible basis for sustaining the judgment is by presuming, contrary to actuality, that the law of Canada, proof of which she prevented, is the same as the Washington death statute. Because in federal courts there is a well-defined rule prohibiting the application of such a presumption, appellee contends that a federal court cannot apply its own procedural rules and must apply the foreign law presumption of the state in which it sits. Appellee relies on *Erie v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 85 L.Ed. 1477, and fourteen cases cited on pages 10 and 11 of her brief, none of which support her contention.

It is appellant's position that the case at bar is controlled by *Cuba Railroad Co. v. Crosby,* 222 U.S. 473, 56 L.Ed. 274, which lays down the federal foreign law presumption rule. This case has not been superseded or displaced by the *Erie* or *Klaxon* cases, or any case decided on its authority, notwithstanding appellee's unsupported contrary assertion (Br. 7).

The federal judiciary has its own rules as to how foreign law shall be presented for consideration by the court; namely, formal proof, judicial notice of foreign law, and presumption of foreign law. The judicial notice rule is: The law of any state of the United States, whether statutory or decisional, is a matter of which the courts of the United States are bound to take judicial notice. *Lamar v. Micou,* 114 U.S. 118, 29 L.Ed. 94; *Kaye v. May,* 296 Fed. 450; Goodrich, *Conflict of Laws,* Sec. 80, p. 195. Judicial notice will not be taken of the laws of a foreign country. *Liverpool v. Phenix Ins. Co.,* 129 U.S. 398, 32 L.Ed. 788; *Molina v. Sovereign Co.,* 6 F.R.D. 385.

The federal presumption of foreign law rule is: As be-

tween two common law countries, the common law of one may be presumed to be what it has been decided to be in the other, but it cannot be presumed to be like a statute of the other. *Cuba R. Co. v. Crosby, supra.* The Ninth Circuit also follows this rule. In *Gordon v. Commissioner*, 75 F.2d 429, the court refused to presume that the law of Canada relating to contracts between husband and wife was the same as the California statute on that subject. In the *Baymead*, 88 F.2d 144, this court again applied this rule and refused to presume that the laws of a foreign country upon which the claimant's right to a lien was governed were the same as the local law. This rule and the *Cuba* case were cited and followed again in *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (1956).

The term "conflict of laws" refers to conflicts between the laws of the state jurisdiction where the federal case is brought and the substantive law of the jurisdiction where the cause of action arose.

The issue before this court is: In a diversity of citizenship case shall state or federal procedural rules be applied by the federal district forum where the case is controlled by the law of a foreign jurisdiction and such law has not been pleaded or proved? Two cases, *Petersen v. Chicago, G.W.R.Co.*, 3 F.R.D. 346 and *B. & O. R. Co. v. Reaux*, 59 F. Supp. 969, clearly, flatly, and unconditionally hold that the federal court shall apply its own procedural rule in this situation and not the state foreign law presumption, even though the federal rule produces a decision different from the decision which would have been reached had the suit been in the state court. Appellee went to some lengths to avoid citing these cases.

The *Petersen* case was transferred to the district court from the Nebraska state court. Plaintiff sustained injuries in Iowa while a passenger on defendant's train. The law of

Iowa was not pleaded or proved. Under Iowa law the railroad was liable only if its negligence was proved. Under a Nebraska statute the plaintiff was not required to prove negligence. Under Nebraska conflict of laws rules the law of Iowa governed. In the absence of pleading and proof, the Nebraska court would not take judicial notice of Iowa law but would presume it to be the same as the Nebraska law on the subject. Upon these facts plaintiff could prevail only if the Nebraska foreign law presumption was applied. Defendant would win if the district court, under the federal rule, took judicial notice of the Iowa law.

Relying on the *Erie* and *Klaxon* cases and *Waggaman v. General Finance Co.*, 116 F.2d 254, plaintiff contended that the district court must follow the rule of the state of the forum on conflict of laws questions. This is precisely the position that appellee has adopted here. The court in the *Petersen* case conceded that to be true, as does appellant in the case at bar. The reasoning of the plaintiff in the *Petersen* case and of appellee in this case are in all respects identical. But the conclusion that the federal court was obliged to hold, contrary to actuality, that the governing substantive law of the foreign jurisdiction was identical with that of the state of the forum does not follow. In the *Petersen* case, the plaintiff's reasoning proceeded by these steps:

> "(a) The law of Nebraska on conflict of laws must govern so far as it is involved in this case; (b) By that law since the plaintiff's petition rests upon an alleged tort committed in Iowa, the law of the state of Iowa governs upon the substantive issue of the existence of a cause of action; (c) Iowa is, as to Nebraska, a foreign state; (d) The law of a foreign state, in a Nebraska state court, is a fact which must be pleaded and proved; (e) If not so pleaded and proved it must be taken and held to be identical with the law of the forum; (f) Therefore, in this case, in the absence of such pleading and proof, the

> court was obliged to instruct, contrary to actuality, that the governing substantive law of Iowa is identical with that of Nebraska."

As to this reasoning the court said:

> "In these steps the court will readily grant points (a) and (b), and to the extent only of the practice in the local state courts points (c), (d), and (e). But the conclusion does not follow, for it neglects the distinction in origin and nature of the federal and state courts and the rules of judicial notice which must be applied in this court."

The court rejected the summary ruling in the *Waggaman* case pointing out ". . . the lack of thoroughness and maturity in its discussion of the point here argued." The court pointed out that the *Erie* and *Klaxon* cases and *Griffin v. McCoach,* 313 U.S. 498, 85 L.Ed. 1481 do not nullify the federal judicial notice rules. The court ruled:

> "*Erie R. Co. v. Tompkins, supra,* neither overrules nor impinges upon that rule of pleading and evidence rather than of substantive law, which has long been recognized as obligatory upon the federal courts. . . ." * * *
>
> "There is no question respecting whose law governs. The only distinction arises in the technique of pleading and proof, and that distinction issues from a very real difference in the constitution of the two judicial systems."

The court held that it was bound to observe Nebraska conflict of laws rules and thus to administer the actual Iowa law, but that it was not affected by the Nebraska foreign law presumption and must apply the federal judicial notice rule.

This case is on all fours with the case at bar, even though this court has before it the other facet of the procedure by which federal courts ascertain the effect to be given to foreign law which has not been pleaded or proved—the foreign law presumption. Appellant's position is consistent with the requirement imposed on the district court by the *Erie,*

Klaxon and *McCoach* cases to apply the Washington conflict of laws rules. The Washington court would have applied the substantive law of the place where the accident happened. *Richardson v. Pac. Pwr. & L. Co.*, 11 Wn.2d 288, 118 P.2d 985; *Jeffery v. Whitworth College*, 128 F.Supp. 219.

B. & O. R. Co. v. Reaux, supra, involved a life insurance contract governed by Maryland law, under which an insured's attempt to change the beneficiary during lifetime was ineffective without the insurer's consent. Under Ohio law the insurer's consent was not required. Suit on the policy was brought in the Ohio district court. Ohio recognized that the validity of the contract was governed by Maryland law which was not pleaded or proved. Ohio would not take judicial notice of the Maryland law, but would presume it to be the same as Ohio law.

Here again the situation is parallel to that before this court. If the federal court were to apply the state foreign law presumption, one result would obtain. If it were to apply the federal rule and take judicial notice of Maryland law, a contrary result would follow. In the instant case, assuming the accident happened outside of British Columbia, the application of appellee's version of the Washington foreign law presumption would produce a recovery for appellee by requiring the federal court to presume, contrary to actuality, that the law of Canada seaward of British Columbia was identical to the Washington death statute. But appellant would have prevailed had the district court followed its own foreign law presumption rule, or had evidence been admitted to show there was no wrongful death statute at the place where the court found the accident happened. In the *Reaux* case, too, the plaintiff relied upon the conflict of laws cases to support her contention that the federal court was required to apply

the state foreign law presumption. The court rejected this contention in a well-reasoned opinion in which it properly classified the cases and held that federal judicial notice rules were procedural and applicable. Pertinent portions of the court's opinion are quoted in the Appendix to this brief. Other decisions in accord with the *Petersen* and *Reaux* cases are: *Alcaro v. Jean Jordeau*, 138 F.2d 767 (CCA-3); *Indiana Bank of Indianapolis v. Goss*, 208 F.2d, 617 (CCA-7); *Trust Co. of Chi. v. Penn. R. Co.*, 183 F.2d 640 (CCA-7); *Prudential Ins. Co. v. Carlson*, 126 F.2d 607 (CCA-10); *Zell v. American Seat. Co.*, 138 F.2d 641 (CCA-2); *Gallup v. Caldwell*, 120 F.2d 90 (CCA-3); *George v. Stanfield*, 33 F.Supp. 486 (Ida.); *Wells Fargo v. Titus*, 41 F.Supp. 171 (Tex.); *Colello v. Sundquist*, 137 F.Supp. 649 (N.Y.); *Metropolitan Life Insurance Co. v. Haack*, 50 F.Supp. 55 (La.).

We now turn to the cases cited by appellee (Br. 10, 11). Appellee has obscured the narrow and well-defined legal issue here involved by indiscriminately citing cases not in point, and by citing as authority cases turning on such substantive laws of the state of the forum as burden of proof, res ipsa loquitur, the right to recover interest, and interpretation of state statutes. Furthermore, appellee has loosely joined together such terms as burden of proof and presumption without recognition of the difference in effect between a presumption that forms a part of the substantive law of a state and one that relates only to procedure or the technique of pleading and proof. In addition, appellee has cited conflict of laws decisions which are expressly within the limits of the rules laid down in the *Erie* and *Klaxon* cases, as though determinative of the unrelated problem of what foreign law presumption the federal court shall apply—the issue now before the court. None of the 14 cases supports appel-

lee's contention that whenever federal and state rules as to foreign law presumptions differ, the state rule must be applied. Only the following six cases even involve a foreign law presumption, and none of these present the issue of two conflicting foreign law presumptions: *F.A.R. Liq. Corp. v. Brownell,* 130 F.Supp. 691; *Petersen v. Chi. R. Co.,* 138 F.2d 304; *Sylvania Elec. v. Barber,* 228 F.2d 842; *Waggaman v. General Fin. Co., supra, Krasnow v. National Airlines,* 228 F. 2d 326; *Molina v. Sovereign Co., supra.*

In each of these cases the result would have been the same whether the state or federal foreign law presumption were invoked; which presumption to apply was not in issue. None of these cases discusses or even recognizes the problem of whether the federal procedural rules of judicial notice and foreign law presumption shall apply in a diversity case.

In *Petersen v. Chi. G. R. Co., supra,* the court refused to apply the state foreign law presumption, and instead took judicial notice of the laws of the foreign state under the federal judicial notice rule. Appellee's terse comment (Br. 11) that "Iowa law presumed same as Nebraska" is wrong.

In *Krasnow v. National Airlines, supra,* the district court applied New York law. The appellate court recognized that under the New York conflict of laws rule, Florida law controlled; but it refused to reverse on this ground because the issue was raised for the first time in the plaintiff's reply brief. The opinion disclosed that the federal and New York foreign law presumptions were identical.

In *Waggaman v. General Fin. Co., supra,* the court failed to recognize that a conflict of laws issue was not presented. The court applied the state foreign law presumption which was identical to the federal presumption. Even though the

result would have been the same, the decision has been severely criticized and is no longer the law even in that circuit. *Gallup v. Caldwell, supra; Alcaro v. Jean Jordeau, supra.*

In *Sylvania Elec. v. Barber, supra,* the court properly applied the Massachusetts conflict of laws rule. Appellee's terse statement (Br. 11) that the "Federal Court presumed Nebraska presumption of knowlege of danger same as Massachusetts" is not true. The court, on the question of whether interest should be allowed as an element of damage, did presume that the common law of Nebraska was the same as the common law of Massachusetts. The opinion does not indicate whether the federal or state foreign law presumption was invoked. The two rules were identical, and the same result would have followed under either.

In *F.A.R. Liq. Corp. v. Brownell, supra,* the court held that an affirmative defense based on German law was untenable because not pleaded or proved. The court could not take judicial notice of the laws of a foreign country nor, under *Cuba v. Crosby, supra,* presume that the laws of Germany were the same as those of the forum. In her hurried attempt to compile an imposing list of authorities, appellee apparently failed to notice that this was not a diversity case. A choice between a state and federal foreign law presumption was not involved.

In *Molina v. Sovereign Co., supra,* it was held that federal courts can not take judicial notice of the law of a foreign country. The court then applied what it considered to be the federal foreign law presumption.

Adam Hat v. Lafco, 134 F.2d 101, has been erroneously cited as holding that a federal court must apply the state foreign law presumption. The court properly applied the

conflict of laws rules of Pennsylvania and then took judicial notice of the Delaware and New Jersey laws. This was consistent with the procedural rules of Pennsylvania and federal courts. Contrary to appellee's statement of the holding (Br. 11), the court applied no presumption. It did not even mention the subject.

Appellee's unsupported assertions (Br. 7, 8, 11, 12, 49) that the burden of proof in this case is on appellant, particularly with respect to proof of the governing foreign law, is the product of a superficial and erroneous concept. Appellee, as plaintiff, had the duty to establish and prove a cause of action. Goodrich, *Conflict of Laws,* page 193, Sec. 80. It has not been suggested at any time that any Washington statute or decision relieved her from this requirement.

Appellee alleged, and it may be assumed that she established, the existence of R.C.W. 4.20.010, the Washington wrongful death statute. The assertion that appellant had the duty to prove the governing foreign law, and to demonstrate that appellee did not have a cause of action maintainable thereunder, in order for it to prevail, is an incorrect statement of appellant's duty, and a position unsupported by any Washington authority. Appellee recognizes the correct rule (Br. 15) where it stated that the Washington decisions follow the rule that the party asserting the application of a foreign law different from that of the forum has the duty of pleading and proving that law. In this case the district court's first inquiry should have been to determine whether or not the Washington court would have looked to the law of Canada outside British Columbia as the law governing the rights of the parties under the cause of action asserted. The Washington conflict of laws rule on this point is that it will apply the law of the place where the negligence culminated

in injury. *Richardson v. Pacific P. & L. Co., supra; Jeffery v. Whitworth College, supra.*

The rehearsed answer of witness Cunningham to counsel's hypothetical question (R. 1066) to the effect that the British Columbia court would apply "United States" law, is without legal significance. The witness receded from this position under cross-examination, acknowledging that his view was based solely on an English decision not controlling or binding in Canada. Witness Bird testified that the Canadian rule is that the law of the place where negligence culminates in injury governs. Renvoi has been repudiated and is not followed in the United States. Goodrich, *Conflict of Laws,* Sec. 7, p. 12. From the evidence that was introduced, the court was able to make findings of fact establishing the place of the accident, the death of Sergeant Waldrep resulting from the negligence of appellant, and the survivorship of the minor child for whose benefit the suit was brought. There was no evidence from which the court could make a finding as to the applicable law in Canada seaward of low water mark. Had the case been in the state court for adjudication, appellee's position is that her failure of proof of the applicable foreign law would have been aided by the procedural device of a presumption that the foreign law was identical to the Washington law. Appellee selected the federal court as the forum. It is prohibited by its rules from taking judicial notice of the laws of foreign countries and from presuming that such laws are the same as local statutes. She has not established a right to relief.

The district court's memorandum decision (R. 72-80) and findings and conclusions (R. 82-91) do not indicate how the district court arrived at the result that the Washington death act "governs the right of action herein sued upon in Count 1 of the *Gorter* case, no other applicable law being pleaded or

proved." (R. 73). Until final argument, no reference was made by counsel for either party to the existence or applicability in this case of any foreign law presumption. The court declined in proceedings subsequent to trial to clarify its memorandum decision or to state in either the findings or conclusions what presumption, if any, it had applied. Did the district court erroneously apply the Washington foreign law presumption, or did it correctly regard the federal foreign law presumption applicable and then misconstrue it, as occurred in *Molina v. Sovereign, supra*?

The distinction between substantive matters governed by the *Erie* case and procedural matters, with respect to which federal courts must apply their own rules, is carefully drawn.

> "Procedural rules are those which concern methods of presenting to a court the operative facts upon which legal relations depend; substantive rules . . . concern the legal effect of those facts after they have been established." Stumberg, *Conflict of Laws,* page 128, Ch. VI.

Professor Goodrich, *Conflict of Laws,* Second Edition, Sec. 12, p. 24, recognizes that, since the *Erie* case, federal courts must observe the conflict of laws rules of the state in which it sits. A distinction is made by the court between matters that relate to substance, or matters of right, and those which relate to procedure, or matters of remedy (Sec. 77, p. 187). Procedure is governed by the internal law of the forum regardless of where the transaction occurred (Sec. 77, p. 189), whereas substance is determined by the law where the transaction took place (Sec. 80, p. 193). Procedure "relates to the process or machinery by which the facts are made known to the courts." Lorenzen, *The Statute of Frauds and the Conflict of Laws,* 32 Yale Law Journal 311, 325.

When a case contains unproved foreign law elements

which cannot be judicially noticed, Prof. Goodrich sets forth the courses open to the court: (1) The party whose action or defense depends on a foreign law and who fails to prove it, loses because he has not made out his case. (2) The court may apply the internal law of the forum to the facts presented on the ground that this is the only law before the court. (3) If neither of the above courses is taken, certain presumptions may be indulged. He then points out that the foreign law presumption is procedural, not substantive, because it relates to the manner in which facts are to be proved rather than to the facts themselves. (Sec. 80, 81, pp. 195-8)

On each of these approaches appellant is entitled to judgment. Under (1) appellee's action depended on the law of Canada; that was not proved, and she therefore failed to make out her case. Under (2) the district court could not apply the Washington death act directly because it has no extraterritorial force or effect (Appellant Br. 40-45). This is conceded (Appellee's Br. 24). Under (3) the district court had the duty to follow the federal foreign law presumption rule, a matter of procedure governed by the forum.

The remaining cases cited by appellee (Br. 10) involve substantive issues where the federal courts yield to the local law of the state in diversity cases. Representative of this type of case are *New York L. Ins. Co. v. Rogers*, 128 F.2d, 784, and *Equitable Assur. Soc. v. MacDonald*, 96 F.2d 437, where the court applied state laws as to burden of proof of affirmative defenses. In *Hagen v. Washington W. P. Co.*, 99 F.2d 614, the state substantive doctrine of res ipsa loquitur was applied. In *Bank of America v. Parnell,* 352 U.S. 29, 1 L.Ed.2d 93, *Palmer v. Hoffman,* 318 U.S. 109 87 L.Ed. 645, and *Cities Serv. Co. v. Dunlap,* 308 U.S. 208, 84 L.Ed. 196, the court simply held that state law determines the necessary elements

of a cause of action. Such matters are substantive and require reference to local law. These cases involved respectively the duty to show good faith of the holder of a forged instrument; freedom from contributory negligence; and that the record title holder to real property was not a bona fide purchaser.

The other three cases relied on by appellee, *Klaxon Co. v. Stentor, Sylvania v. Barber, supra,* and *Sampson v. Channell,* 110 F.2d 754, are holdings that the duty of the federal court to apply local substantive law extends to conflict of laws. This was pointed out in *Petersen v. Chi. G. W. R. Co.*, 138 F.2d 304, where the court, in refusing to apply the state foreign law presumption and recognizing it to be simply a procedural rule, stated:

> "There cannot possibly, therefore, have been any violation of *Erie Railroad Co. v. Tompkins* and *Klaxon Co. v. Stentor Electric Mfg. Co., supra,* in the present situation, for those decisions go no further in their concrete application, than to require a federal court to follow the same substantive rules in diversity of citizenship cases that a state court would have applied in the particular case . . ."

VI. Cost of Transcript and Record

Appellee's contention (Br. 46-47) that the cost of the record relating to the negligence issues should not be taxed against her is without merit. Appellant has not appealed from the district court's findings on negligence. So far as the issues on appeal are concerned, reference to the court's 12 findings on negligence (R. 84-87) is sufficient for all legitimate purposes of the litigants.

The judgment should be reversed.

Respectfully submitted,

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APPENDIX

The following is a portion of the opinion in *B. & O. R. Co. v. Reaux,* 59 F.Supp. 969, pages 974-975:

"The court is of the opinion that claimant's position is untenable in that it advances an unwarranted extension of the doctrine of these Supreme Court cases, all of which stem from *Erie R. R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487. The Supreme Court has held merely that, in diversity of citizenship cases, a Federal court must apply the conflict of laws rules of the state in which it sits. The court did that in this case. The conflict of laws questions involved were what law governed the construction of the contract of insurance in question, and where that contract had been made or entered into. Ohio law, as handed down by the Supreme Court of Ohio in *Alropa Corporation v. Kirchwehn,* 138 Ohio St. 30, 33 N.E.2d 655 (cited in court's Opinion), was to the effect that the construction of a contract is governed by the law of the state where such contract is made or is to be performed. It is not disputed that the contract was made in Maryland. The court, in its opinion, again cited Ohio law, along with other authority, to the effect that the place where the insurance application is made and accepted and the policy delivered is the place where the contract is entered into. The law of Maryland, therefore, was to be applied by this court because that would be the law which the courts of Ohio would apply.

"It does not follow, however, that because Ohio courts would not take judicial notice of the law of Maryland, this court may not do so. The doctrine of judicial notice is not a conflict of laws rule. In discussing this same question the court, in *Petersen v. Chicago, Great Western Ry. Co.,* D.C., 3 F.R.D. 346, at page 348, called it a 'rule of pleading and

evidence rather than of substantive law, * * *.' A concise and well-reasoned statement on this question is that of Judge Goodrich in *Gallup v. Caldwell,* 3 Cir., 120 F.2d 90 at page 94: 'This rule as to judicial notice is not affected by *Erie R. R. v. Tompkins,* 1938, 304 U.S. 64, 58 S.Ct. 817, L.Ed. 1188, 114 A.L.R. 1487. That case dealt with the question of the application of the substantive law of a given state, not how such substantive law is brought to the attention of a federal court. Indeed it is implicit in the *Tompkins* decision that it did not affect the rule as to judicial notice in the federal courts since the Supreme Court remanded the case to the Circuit Court of Appeals with instructions that the law of Pennsylvania be applied, even though the Pennsylvania law was not pleaded or proved, and the case was tried in the Southern District of New York. We conclude, therefore, that in the instant litigation we take judicial notice of the law of New Jersey in so far as it is applicable to the rights of the parties in this case.'

"See, to the same effect, *Alcaro et al v. Jean Jordeau, Inc.,* 3 Cir., 138 F.2d 767; *Wells Fargo Bank & Union Trust Co. v. Titus,* 41 F.Supp. 171; *Metropolitan Life Ins. Co. v. Haack, et al.,* D.C., 50 F.Supp. 55; *George v. Stanfield et al.,* D.C., 33 F. Supp. 486.

"While it is true that the case of *Waggaman v. General Finance Co., supra,* sustains the position of claimant Welshhans, there should be considered, in the words of the court in *Petersen v. Chicago, Great Western Ry. Co., supra,* 3 F.R.D. at page 348, 'the lack of thoroughness and maturity in its discussion of the point here argued.' It should also be noted that the two cases from the Third Circuit, decided after the *Waggaman* case, viz., *Gallup v. Caldwell, supra,* and *Alcaro v. Jean Jordeau, supra,* are directly opposed to the doctrine of that case so that it can no longer be considered the law of the Circuit."